

83-1130

Office - Supreme Court, U.S.

FILED

JAN 9 1984

NO.....

ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States

October Term, 1983

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; and STATE DEPARTMENT OF TRANSPORTATION,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILROAD COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; and UNION PACIFIC RAILROAD COMPANY,

Respondents,

IOWA RAIL SHIPPERS ASSOCIATION,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF IOWA

Thomas A. Miller, Att'y Gen.
Brent R. Appel
Harry M. Griger
Lester A. Paff
Iowa Department of Justice
Second Floor Hoover Building
Des Moines, Iowa 50319
Telephone: (515) 281-5164

Donald A. Wine
Stephen W. Roberts
David W. Dunn
Davis, Hockenberg, Wine,
Brown & Koehn
2300 Financial Center
Des Moines, Iowa 50309
Telephone: (515) 243-2300

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

- I. Whether Congress Intended The 4-R Act (49 U.S.C. § 11503) To Oust Traditional State Authority To Enact Reasonable Excise Taxes Upon Rail Carriers For The Purposes of Rehabilitation, Repair and Restoration of Deteriorating Rail Lines and Services.
 - A. Whether the 4-R Act is limited to state property taxes.
 - B. Whether a state's fuel tax discriminates against rail carriers.
- II. Whether a State is Prohibited by the Commerce Clause From Imposing a Non-Discriminatory Tax on Locomotive Fuel Consumption in the Taxing State.
- III. Whether a State is Prohibited by the Supremacy Clause From Imposing Reasonable Taxes Upon Rail Carriers Where the Tax Revenues Are Intended To Be Used To Renovate, Rehabilitate and Restore Service on Deteriorating Rail Lines.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

CASES:

The Atchison, Topeka and Santa Fe Railway v. Bair, 338 N.W.2d 338 (Iowa 1983)	2
Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	10
Complete Auto Transit v. Brady, 430 U.S. 274 (1977)...	9
Greenough v. Tax Assessors of Newport, 331 U.S. 486 (1947)	6
Helson & Randolph v. Kentucky, 279 U.S. 245 (1929)	9
Rewis v. United States, 401 U.S. 808 (1971)	6
United States v. Bass, 404 U.S. 336 (1971)	6
United States v. Five Gambling Devices, 346 U.S. 441 (1953)	6

UNITED STATES CODE:

28 U.S.C. § 1257(3)	2
28 U.S.C. § 2101(c)	2

TABLE OF CASES AND AUTHORITIES—Continued

	Page
49 U.S.C. § 1654(f)	8, 9
49 U.S.C. § 10101	9
49 U.S.C. § 10101(a)	8
49 U.S.C. § 10905	8, 9
49 U.S.C. § 10910	8
49 U.S.C. § 11503	4
49 U.S.C. § 11503(b)(4)	2, 4

STATUTES AT LARGE:

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1985	8
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (4-R Act)	2, 5
§ 306	3, 4, 5, 7, 8, 9
§ 306(1)(a)-(e)	5
§ 306(1)(d)	2, 4, 5, 6, 7, 8
§ 306(2)	5
§ 306(2)(e)	5
§ 306(3)	5
§ 803	8

IOWA STATUTES:

Iowa Code Chapter 307B (1983)	2, 8
§ 307B.5	4

TABLE OF CASES AND AUTHORITIES—Continued

	Page
Iowa Code Chapter 324A (1983)	2
§ 324A.1	4
§ 324A.3	3, 4
§ 324A.9	4
1981 Iowa Acts, Chapter 3, § 29	4
OTHER AUTHORITIES:	
L. Tribe, American Constitutional Law (1978)	7

NO.....

IN THE
Supreme Court of the United States
October Term, 1983

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; and STATE DEPARTMENT OF TRANSPORTATION,
Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILROAD COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; and UNION PACIFIC RAILROAD COMPANY,
Respondents,

IOWA RAIL SHIPPERS ASSOCIATION,
Intervenor-Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF IOWA**

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this case.

OPINION BELOW

The opinion of the Iowa Supreme Court is reported at *The Atchison, Topeka and Santa Fe Railway v. Bair*, 338 N.W.2d 338 (Iowa 1983). Appendix at 10.

JURISDICTION

The opinion of the Iowa Supreme Court was entered September 21, 1983. A timely Petition for Rehearing was denied by the Iowa Supreme Court on October 13, 1983. Appendix at 28. This Petition for a Writ of Certiorari was filed within 90 days of that date. Accordingly, this Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the anti-tax discrimination provisions of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 ("4-R Act") contained in 49 U.S.C. § 11503(b)(4) and Iowa Code Chapter 324A (1983) which imposes a tax of eight cents (\$.08) per gallon on rail carriers' use of fuel to propel locomotives in Iowa. The following statutes are also involved in this case, but because of their length are set out verbatim in the Appendix, at 116-50: Iowa Code Chaps. 307B, 324A (1983).

Section 306 of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 54 states in part:

Prohibiting Discriminatory Tax Treatment of Transportation Property

(1) [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

* * *

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Iowa Code § 324A.3 (1983) states in part:

324A.3 *Tax imposed.* For the privilege of operating railway vehicles in this state, an excise tax is imposed at the rate of three cents per gallon beginning October 1, 1981 and is imposed at the rate of eight cents per gallon beginning July 1, 1982 upon the use of fuel for the propulsion of a railway vehicle within the state. . . .

In addition, this case concerns the interpretation of the Supremacy Clause, U.S. Const. art. VI, cl. 2, Appendix at 115, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Appendix at 114, and their applicability to the state tax on rail carriers' use of diesel fuel intended to be expended as part of a program to restore and rehabilitate deteriorating railway lines and services.

STATEMENT OF THE CASE

Respondents are rail carriers operating in Iowa subject to the jurisdiction of the Interstate Commerce Commission and subject to the tax on use of diesel fuel to propel railway vehicles imposed by Iowa Code § 324A.3 (1983). Intervenor-Respondent is an association of rail shippers who in the proceedings below allied themselves with and adopted the arguments of Respondents. Petitioners are state officials or departments involved in the collection or proposed expenditure of this tax.

In 1981 the Iowa General Assembly enacted a Special Excise Tax on rail carriers measured by the amount of fuel consumed by railway vehicles in the State. 1981 Iowa Acts Chapter 3, § 29 (codified as Iowa Code Sections 324A.1-9 (1983)). Revenue from the tax is placed in a special railroad facility fund, Iowa Code § 324A.9 (1983), for use in carrying out the functions of the Iowa Railway Finance Authority ("Authority"), which include "providing for the financing of railway facilities and enhancing and continuing the operation of railway facilities" in Iowa. Iowa Code § 307B.5 (1983).

Respondents challenged the tax in Polk County District Court based on a number of constitutional and statutory grounds, including alleged violations of § 306 of the 4-R Act (49 U.S.C. § 11503), the Supremacy Clause and the Commerce Clause. The District Court upheld the tax. Appendix at 30-110.

In a five to four decision, the Iowa Supreme Court found that the tax violated § 306(1)(d) of the 4-R Act (49 U.S.C. § 11503(b) (4)) because, in the court's view, the tax placed the rail carriers at a competitive disadvan-

tage when compared with other modes of transportation. Having found the tax invalid under § 306(1)(d), the majority of Iowa Supreme Court did not decide the Commerce Clause and Supremacy Clause issues that were appealed by Respondents. The dissent decided all issues in favor of Petitioners. Appendix at 22-27.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

- A. If unreviewed, the expansive construction of Section 306 by the Iowa Supreme Court will severely impair the sovereign power of the states to impose any tax on rail carriers.**

The expansive construction of Section 306 by the Iowa Supreme Court, if unreviewed by this Court, severely impairs states from exercising their sovereign right to tax rail carriers operating within the state. The language and legislative history of Section 306 of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 54 do not support the view that Congress intended § 306 to apply to all taxes on rail carriers, as the Iowa Supreme Court has determined. With the exception of the "any other tax" language of § 306(1)(d), all of Section 306 relates solely to property taxation. See §§ 306(1)(a)-(c), 306(2), 306(2)(e), 306(3). Appendix at 111-13. Despite this overwhelming property tax context, the Iowa Supreme Court determined that the use of three words "any other tax" in Section 306(1)(d) evidenced congressional intent to invade and overturn state excise taxation of rail carriers, an area of traditional state authority vital to the existence of the states, *e.g.*,

Greenough v. Tax Assessors of Newport, 331 U.S. 486, 490 (1947).

If the tax discrimination provision of § 306(1)(d) applies to state excise taxes, as decided by the Iowa Supreme Court, the provision threatens the revenue systems of many states. Reasonable state excise taxes traditionally imposed on rail carriers such as income, sales and use, business license, and gross receipts taxes are endangered unless the Iowa Supreme Court's opinion is overturned. States need these vital sources of revenue at a time when spending cutbacks by Congress have caused the states to assume additional fiscal responsibilities to provide their citizens with services needed in a complex modern society.

The Iowa Supreme Court's broad interpretation of Section 306(1)(d) ignored this Court's requirement that Congress enact a "clear statement" of its intent when a congressional enactment impinges on traditional state authority. See *United States v. Bass*, 404 U.S. 336, 349 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Five Gamb'ing Devices*, 346 U.S. 441, 449 (1953). Since there is no clear statement in § 306(1)(d) of congressional intent to implicate state excise taxes, adherence to the clear statement rule should be applied by this Court so as not to oust the traditional and fundamental right of a state to enact a reasonable excise tax necessary for the welfare and economic development of the state.

The Iowa Supreme Court decided that Congress, by using the words "any other tax", § 306(1)(d), effectively invaded and usurped an area long reserved to the discretion of the states and prohibited states from enacting reasonable taxes upon rail carriers that the states deem

necessary for the well-being of their inhabitants. Judicial interpretation of such imprecise congressional language to invade an area so essential to the existence of states threatens the very foundation of federalism upon which this republic is based. See L. Tribe, *American Constitutional Law* 242-43 (1978).

B. This Court should review the case to provide guidance to the states and taxpayers in determining when a tax is discriminatory.

If Section 306 applies to excise taxes, under the Iowa Supreme Court's interpretation of the Section, a state excise tax is discriminatory if it causes the rail carrier to suffer a "competitive disadvantage." Appendix at 16-20. The Iowa Supreme Court's use of a competitive disadvantage test finds no support in the language or legislative history of Section 306 and has far reaching ramifications. Application of this test results in the anomalous conclusion that the eight-cent per gallon tax on rail carriers' use of diesel fuel is discriminatory in comparison with the fifteen and one-half cents per gallon tax on trucks' use of diesel fuel. Appendix at 16-17.

Section 306 and its legislative history are silent on the proper class of taxpayers with which to compare rail carriers to determine if excise taxation is discriminatory or the test to be used to determine if such discrimination exists. Appendix at 111-13. In the absence of any guidance from this Court, state legislatures cannot determine with any degree of certainty if an excise tax on rail carriers is permissible. Even if section 306(1)(d) is construed to apply to state excise taxes on rail carriers, a Writ of Certiorari should be granted in this case to clarify congressional intent as to the test of discrimina-

tion courts should use in determining the validity of an excise tax under § 306(1)(d).

- C. If unreviewed, the Iowa Supreme Court's interpretation of Section 306 will erode the ability of states to promote rail transportation as encouraged by the 4-R Act.**

This case also presents the Court the important question of whether revenues from a nondiscriminatory state tax upon rail carriers to be expended by the state to enhance rail service in the state are prohibited by Section 306(1)(d). The 4-R Act encourages state involvement in rail rehabilitation. *See* 4-R Act § 803, 49 U.S.C. § 1654(f). The 4-R Act and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, expressly recognize that abandoned rail lines can again be placed in service under the operating auspices of another carrier. 49 U.S.C. § 10905. Rail lines proposed to be abandoned by major carriers may still be needed to satisfy local rail needs and may again be placed in service as short lines. 49 U.S.C. §§ 10905, 10910. The Staggers Rail Act strongly supports maintenance of rail competition as a national goal. 49 U.S.C. § 10101a.

Rail line deterioration is a national problem with acute consequences for consumers, shippers and rail carriers. For example, Iowa and other states have had to face transportation crises, yet unresolved, arising from the bankruptcy and subsequent loss of service by two major rail carriers. States should be encouraged to pursue local programs to enhance rail service. In Iowa, these bankruptcies and severe loss of service led to the state-initiated program of rail restoration and rehabilitation codified in Iowa Code Chapter 307B (1983) which was to

be principally funded by the tax imposed on rail carriers' use of diesel fuel. Section 306 should not be an impediment to such a state-initiated program to enhance and restore vital rail service which will benefit consumers, shippers and rail carriers. The Iowa Supreme Court's interpretation of Section 306 defeats this innovative effort.

D. This Court should resolve questions under the Commerce and Supremacy Clauses concerning taxation of fuel.

An additional issue before the Iowa Supreme Court was whether the tax on rail carriers' use of fuel was constitutional under the commerce clause. This Court has never expressly overruled *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929) that invalidated a tax, similar to the Iowa tax, upon fuel consumed in Kentucky waters by a boat operating in interstate commerce. The vitality of the *Helson* case is doubtful in light of this Court's landmark holding in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Issuance of a Writ of Certiorari in this case would give the Court the opportunity to expressly overrule *Helson*.

The final question before the Iowa Supreme Court was whether a state tax on rail carriers to be expended to rehabilitate and enhance rail service in the state violates the supremacy clause through an inherent conflict with the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917. As previously discussed, the 4-R Act, 49 U.S.C. § 1654(f), and the Staggers Rail Act, 49 U.S.C. § 10905, recognize and encourage states to become involved in the restoration of service on abandoned rail lines. Respondents argued before the Iowa Supreme

Court that such restoration of service on abandoned lines would inevitably result in competition that frustrated and conflicted with the provisions of the Revised Interstate Commerce Act permitting rail carriers to abandon unprofitable lines. This Court should affirm that innovative state sponsored programs, funded by a tax on rail carriers, which are intended to restore rail service on abandoned lines in order to provide rail transportation to communities left without service, do not conflict with the Revised Interstate Commerce Act. *See Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the Iowa Supreme Court.

Respectfully submitted,

THOMAS A. MILLER, Att'y. Gen.

BRENT R. APPEL

HARRY M. GRIGER

LESTER A. PAFF

Iowa Department of Justice

Second Floor Hoover Building

Des Moines, Iowa 50319

Telephone: (515) 281-5164

DONALD A. WINE

STEPHEN W. ROBERTS

DAVID W. DUNN

DAVIS, HOCKENBERG, WINE,

BROWN & KOEHN

2300 Financial Center

Des Moines, Iowa 50309

Telephone: (515) 243-2300

Attorneys for Petitioners.